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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM ROGERS

Petitioner,

v.

DISTRICT OF COLUMBIA

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The District of Columbia

PETITION FOR WRIT OF CERTIORARI

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August 18, 1999

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54 pp

QUESTIONS PRESENTED

1. Whether the constitution protects an inner city high school teacher from the termination of his governmental employment in retaliation for advocating the teaching of advanced mathematics to minority high school students?

2. Whether Petitioner was denied his constitutional rights to due process of law when lower federal courts overlooked important evidence, ruled that one must exhaust First Amendment remedies, failed to correct constitutional errors and denied Petitioner an opportunity to be heard concerning deprivation of his constitutional rights?

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DISTRICT OF COLUMBIA

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia

---

PETITION FOR WRIT OF CERTIORARI

The petitioner William Rogers respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 7, 1999.

OPINIONS BELOW

The Judgment and opinion of the Court of Appeals for the District of Columbia Circuit is unpublished and appears in Appendix 4a hereto. The opinion of the United States District Court for the District of Columbia appears at Appendix 10a hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 7, 1999. A timely petition for rehearing was denied on May 20, 1999, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First Amendment and the

Due Process Clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner started his employment as a teacher with the D.C. Public School system in 1971. He was a mathematics teacher at Anacostia High School from 1973 to 1996. The student population of Anacostia High School is overwhelmingly African-American. Petitioner served in the U.S. Army from 1959-1961, where he was honorably discharged. Petitioner possesses a Bachelor's degree in mathematics, a Masters degree in Computer Science and Math Education and was a Ph.D candidate at American University at the time of his discharge. After over 20 years of service, Petitioner had never received a bad or unsatisfactory performance rating. In fact, Petitioner served as Chairman of the Math Department at Anacostia from 1993

to 1995. During the Fall semester of the 1995 school year, Petitioner's request to teach advanced placement mathematics at Anacostia High School was denied. It was Petitioner's expressed opposition to the denial of his proposal for the school to teach advanced mathematics in the school curriculum that he contends he was retaliated against for exercising his First Amendment rights. In 1996, Petitioner's performance evaluation was lowered for the first time and he was terminated under the pretext of a reduction in force. The District Court granted summary judgment on Petitioner's constitutional claim on the asserted basis of "fail[ing] to exhaust his First Amendment administrative remedies with

respect to his First and Fourteenth Amendment claims." JA at 101.[1]

REASONS FOR GRANTING THE WRIT

Petitioner has been deprived of substantive constitutional rights to free speech concerning advocating an advanced educational curriculum for minority inner city students and due process rights in the loss of his long-term governmental employment for exercising his First Amendment rights. In addition, Petitioner has been denied a fair process and forum in which to contest the deprivation of his constitutional rights. First, there were mistakes in the District Court concerning Petitioner's constitutional claims, i.e., one must exhaust an administrative process

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[1] All references to the Fourteenth Amendment should be to the Fifth Amendment as the correct due process and equal protection provisions covering the District of Columbia. See, Bolling v. Sharpe, 347 U.S. 497 (1954).

before raising a constitutional claim which clearly influenced an award of summary judgment to the Government of the District of Columbia. Second, the District of Columbia Circuit's opinion misapprehended the true nature of Petitioner's constitutional claims and erroneously articulated an untenable legal position that could have been pointed out and corrected had oral argument been allowed as originally ordered. Petitioner has not received the process he was due under the Constitution and this Court must use its supervisory powers to correct this miscarriage of justice.

Petitioner is filing this petition because the District of Columbia Circuit misapprehended relevant evidence and points of law when rendering its decision. In the interest of substantial justice, a Petition is required to give this Court an

opportunity to establish the parameters of cultural freedom for inner city public school teachers, correct the errors, oversights and misapprehension of constitutional principles, points of law and disputes left open in the District of Columbia Circuit's opinion.

A. This Court Must Correct The Erroneous Ruling By the District Court On Petitioner's Constitutional Claims

This Court has an obligation to correct erroneous pronouncements of the law made by lower federal courts when ruling on substantive constitutional rights of a party. Here, the District Court erroneously ruled that "Plaintiff has not pursued the administrative remedies available to him before bringing his First and Fourteenth Amendment claims for damages before this Court. These claims are thus also barred and summary

judgment will be entered for Defendant." App. At 24a. Contrary to the District Court's erroneous ruling, there are no administrative remedies available to Petitioner for correcting constitutional violations. The vindication of the deprivation of constitutional rights is one of the primary reasons we have federal courts. If one has to wait for the exhaustion of an administrative process in order to gain access to a federal court to protect constitutional rights then it is a recognition that one does not have protection in federal court for constitutional rights. The decision of the District Court is contrary to well settled law. See, Darby v. Cisneros, 509 U.S. 137 (1993) and Johnson v. Greater Southeast Community Hospital, 951 F.2d 1268, 1276 (D.C. Cir.1991).

The D.C. Circuit did not correct this obvious misstatement and misapplication of the law by the District Court. Instead, the Circuit erroneously stated that "the evidence demonstrates that the termination of Mr. Rogers could not have been in retaliation for his statements to the media, because he was placed on the reduction-in-force list and so notified before the occurrence of his alleged protected speech." App. At 5a. Unfortunately, the D.C. Circuit misapprehended Petitioner's constitutional argument and supporting evidence in the ruling that was rendered without the benefit of oral argument that was due Petitioner.

B. The D.C. Circuit's Misapprehended Petitioner's Constitutional Argument As Demonstrated By Its Mistaken View Of The Evidence Supporting Petitioner's Claims For Violation of His Constitutional Rights

In the Complaint filed by Petitioner, it was alleged that Petitioner was intentionally selected for the RIF, among other things, because "of his ... prior constitutionally protected speech on matters of public concern, the school curriculum at Anacostia Senior High School." There was substantial record evidence to show that this matter was presented to the EEOC and the District Court before it was presented to the D.C. Circuit. For example, in record evidence before the D.C. Circuit, it was clearly and fully stated that Petitioner's constitutional rights were other than the statements made to the media in 1996. It

was Petitioner's civil rights advocacy for advanced mathematics courses in 1995 that was the constitutional protected speech at issue in this case. It was Petitioner's efforts in trying to enhance the educational and mathematic opportunities of the minority inner city students at Anacostia High School that caused the Government to wrongfully place Petitioner on the RIF list for termination. Because the D.C. Circuit by order dated March 31, 1999, withdrew the expected oral argument, the following evidence in the record was overlooked:

> In May 1995, Mr. Rogers submitted a request to teach advanced placement mathematics courses to his students. In September 1995, when he learned that his request had been denied, he filed a grievance indicating that `I am very much dedicated in the benefit of sequential Instruction of students interested in the advance courses I proposed to teach. To this purpose I am

> committed in pursuing the equity and fairness of including my proposed May 15, 1995 schedule. I simply want to serve and enhance students growth with advance courses in mathematics and if students are not given the opportunity to advance their mathematical skills, they become the victim.'
>
> Mr. Rogers' grievance was rejected and he was not permitted to teach advance mathematics courses, despite the fact his previous students were counting on and had prepared to take these courses. In addition, as a result of exercising his First Amendment right to criticize the school curriculum to improve the education of his students, Mr. Rogers has been subjected to retaliation . . . . Lastly, such retaliation has included eliminating his position for September 1996 allegedly as part of a reduction in force."

The lower federal courts overlooked or ignored all of the above record evidence demonstrating a violation of Petitioner's constitutional rights because of his speaking out in favor of advancing African American, inner city students'

mathematical skills. Although he was not required to, Petitioner raised his constitutional claims with the EEOC as reflected in his Pre-Complaint Questionnaire. ("File several grievance related to discrimination practices by administration, fellow department members of the mathematics Department, denying my first amendment rights, constitution rights, Human Rights, Union Rights and political views.").

This case presents an opportunity to address the historical bias against educating African-Americans for higher level achievement. During the period of slavery in this country, it was against the law in many jurisdictions to teach African slaves to read or write.[2] This

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[2] "While the demands upon their bodies were excessive, the minds of the slaves were left frankly free to atrophy. All slave holders agreed that the thinking slave was a potentially rebellious slave. Among the more insistently

case demonstrates that there are still vestiges of slavery prohibiting the teaching to African American, inner city high school students the knowledge of advanced mathematics. Petitioner simply wanted to "enhanced students growth with advanced courses in Mathematics" because if inner city, African American "students are not given the opportunity to advance their Mathematical skills, they become the victims." This case tells a lot about the lingering vestiges of slavery in American culture. It reveals governmental resistance to the universal teaching of advanced mathematical knowledge to African

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enforced sections of the black codes was the prohibition against teaching a slave to read or write or giving him or her pamphlets, not excluding the Bible or religious tracts. So apprehensive were members of the slavocracy about the great mischief that literacy might stir that in many states it was illegal to teach free as well as enslaved Negroes." Kluger, Simple Justice:The History of Brown v. Board of Education and Black America's Struggle for Equality, p.28 (1976).

American, inner city students and the resultant unconstitutional punishment heaped upon Petitioner who dared to speak out in a free exchange of discourse on this politically charged institutional victimization of black students.[3] Surely Petitioner should not have been required to accept the ugly stereotype that black, inner city students are inferior, rather than wrestle with the reality that black, inner city students are being programmed and mis-educated for failure and victimization in their lives beyond high school, in order to keep his teaching job. Petitioner was engaged in civil rights

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[3]This Court may take judicial notice that where the math SAT performance of blacks has improved in absolute terms and relative to whites it has been partly because of two contributing factors: "patterns of course enrollment among blacks and whites, and policies aimed at improving the educational status of blacks, such as school desegregation and compensatory education efforts." See, "The Schooling of Black Americans" in A Common Destiny: Blacks And American Society, p.350 (1989).

activities when he proposed and advocated his position for compensatory educational efforts in the form of advanced mathematics courses for the students at Anacostia High School. It was his way of speaking out against what he perceived as the continuing victimization of black students at Anacostia High School. He saw his students as people with higher aspirations that were being dashed and not met.[4] This Court should vindicate this important constitutionally protected speech issue by correcting the lower

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[4]The first black person to receive a degree in pure mathematics from an American University did not occurred until the first quarter of the 20th Century. See, Kenschaft, Patricia C., "Black Women in Mathematics in the United States", in Blacks In Science:ancient and modern, Ivan Van Sertima, ed., 293,(1983)("The first year that a Black woman received a Ph.D. degree in pure mathematics from an American university was in 1949. In that year there were two: Marjorie Lee Browne at the University of Michigan and Evelyn Boyd Granville at Yale University,... and the first Black man, [to receive such a degree] Elbert Cox, in 1925 from Cornell." (Footnotes omitted).

federal courts rulings that Petitioner's constitutional case is just about "statements to the media" that occurred after Petitioner had already spoken out about the mis-education of black, inner city students by the Government's prohibiting the teaching of advanced mathematics at Anacostia High School.[5]

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[5]With regard to the now well established "differential course taking" hypothesis that Petitioner was advancing at Anacostia H.S., it is now clear amongst educational researchers in the area of mathematics, the patterns of course enrollment are related to achievement test performance. See, "The Schooling of Black Americans" in A Common Destiny: Blacks And American Society, p.350 (1989). This is because blacks are less likely than whites to be enrolled in advanced mathematics course. Id. Moreover, in schools with larger proportions of black students, such as Anacostia H.S., there is a tendency for such schools to have a lower average number of advanced mathematics courses taken by students. Id. Based on his doctoral studies, Petitioner was quite aware of the recent data demonstrating that although black students at Anacostia were less likely to be enrolled in advanced mathematics classes, he wanted to change this pattern because of the strong relation that existed between course taking and test performance, especially in the area of Mathematics. Id. At 351. This Court can take judicial notice of the scholarly research that supports the above findings and Petitioner's advocacy for advanced mathematics courses at

This case is about the unfair price an inner city high school mathematics teacher had to pay for advocating cultural literacy in advanced mathematics for inner city High School students in the nation's capital. Granting this petition is extremely important because it is now time to again address the legal questions of educational policy and social justice for minority inner city students in particular, and all students in our

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Anacostia. See, Martin L. Johnson, Blacks in mathematics: a status report. Journal for Research in Mathematics Education 15(2):145-153 (1984); Lyle V. Jones, Nancy Burton, and Ernest C. Davenport, Monitoring the mathematics achievement of black students. Journal for Research in Mathematics Education 15(2):154-164 (1984); Cora Bagley Marrett, Black and Native American students in precollege mathematics and science. Pp. 7-32 in Linda S. Dix, ed., Minorities: Their Underrepresentation and Career Differentials in Science and Engineering, Proceedings of a Workshop. Office of Scientific and Engineering Personnel. Washington, D.C.: National Academy Press(1987); and Westina Matthews, Influences on the learning and participation of minorities in mathematics. Journal for Research in Mathematics Education 15(2):84-95 (1984).

country in general. Petitioner's advocacy for sharing knowledge of advanced mathematics with minority inner city high school students in order to enable such students to acquire equally the ability to hold positions of responsibility and power in our country. Petitioner's advocacy for the necessity of exposure to and mastering of advanced mathematics for inner city students to avoid patterned victimization and to ameliorate their social and economic status deserves legal protection.

The essence of Petitioner's advocacy of the broader issues of educational policy and social justice for inner city students was succintly stated in E.D. Hirsch, Jr.'s book entitled Cultural Literacy: What Every American Needs to Know (1987):

> Industrialized civilization [imposes] a growing cultural and structural complexity which requires persons to have a broad grasp of what Professor Hirsch has called cultural literacy: a deep understanding of mainstream culture, which no longer has much to do with white Anglo Saxon Protestants, but with the imperatives of industrial civilization. It is the need for cultural literacy, a profound conception of the whole civilization, which is often neglected in talk about literacy.

See, Hirsch, Cultural Literacy, p. 10-11 quoting Harvard historian and sociologist Orlando Patterson at the conference dedicated to Mina Shaughnessy, an English teacher who devoted her professional life to helping disadvantaged students become literate. Id.

The lingering shadow of slavery and segregation are implicated in current discussions of educational policy and social justice for students in the inner cities of this country. Petitioner dared

to speak up for cultural literacy in advanced mathematics and was fired by the local governmental school system. This has a chilling effect on freedom of speech, due process and equal protection of the law. If Petitioner cannot turn to the federal courts for competent vindication of his rights, where does he go for vindication after being punished for petitioning his government for redress of a grievance in intentionally victimizing inner city students to a life of menial tasks and poverty. Petitioner is simply asking this Court to protect his right to advocate to local governmental school officials the need to complete the work started by this Court in its landmark cases of Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954).

Petitioner Was Denied A Hearing

Contrary to the D.C. Circuit's assertion in its Order dated March 31, 1999, oral argument would have been of significant aid to the Court in fairly considering and deciding this case. First, this case is far from frivolous. Second, the dispositive issue or issues have not been authoritatively decided, e.g., neither the District Court nor the D.C. Circuit has properly or even remotely addressed the correct constitutional issue concerning Petitioner's right to speak out in defense of his proposal to teach advanced mathematics to black, inner city high school students without fear of retaliation from the Government of the District of Columbia. Third, while Petitioner's constitutional claims are properly raised in Petitioner's record on appeal, the D.C. Circuit has ignored the

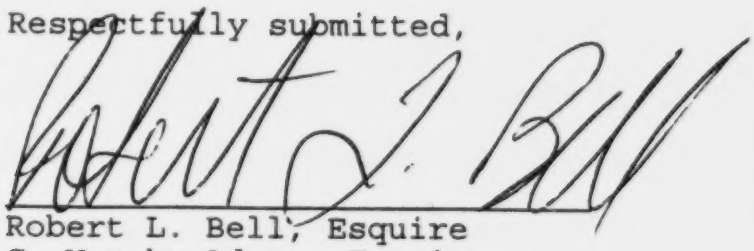
constitutional argument and its applicable timing to the facts of this case. Based on the D.C. Circuit's erroneous ruling, it is clear beyond cavil that Petitioner's briefs, pleadings and record evidence have not been adequately analyzed. The facts and legal argument of Petitioner on his constitutional issues have been misapprehended as evidenced by the D.C. Circuit's erroneous finding in its decision "that the termination of Mr. Rogers could not have been in retaliation for his statements to the media, because he was placed on a reduction-in-force list and so notified before the occurrence of his alleged protected speech." App. At 5a.

CONCLUSION

For these foregoing reasons, a writ of certiorari should issue to review the

judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
MAY 20 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: [/s/]
Robert A. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
MAY 20 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge, Rogers, Circuit Judge, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed May 5, 1999, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: [/s/]
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 **September Term, 1998**

William F. Rogers,
Appellant,

V.

FILED
APR 7 1999

District of Columbia,
Appellee,

Appeal from the United States District Court
for the District of Columbia
(No. 97cv2093)

BEFORE: **EDWARD**, Chief Judge, **ROGERS**, Circuit Judge, and **BUCKLEY**, Senior Circuit Judge

JUDGMENT

This cause came to be heard on appeal from an opinion and judgment of the United States District Court for the District of Columbia and was briefed by counsel.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

The issues have been accorded full consideration by the Court, and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the District Court is affirmed. With respect to Mr. Rogers's age discrimination claim, we affirm essentially for the reasons stated in the District's Court's opinion. With respect to his First Amendment claim, the evidence demonstrates that the termination of Mr. Rogers could not have been in retaliation for his statements to the media, because he was placed on a reduction-in-force list and so notified before the occurrence of his alleged protected speech. Moreover, because the District of Columbia raised this argument below, it is proper for this court to decide the First Amendment claim on these grounds. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); Freeman v. B & B Assocs., 790 F.2d 145, 151 (D.C. Cir. 1986) ("An appellate court . . . will freely consider any argument by an appellee that supports the judgment of the district of court including arguments rejected by the district court and even arguments contradicting the logic of the district court.").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See FED.R.APP.P. 41(b); D.C. CIR. R. 41.

Per Curiam
FOR THE COURT:
/s/
Mark J. Langer
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
Mar 31 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge, Rogers, Circuit Judge, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purposes of Rule 34(j) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case will be considered and decided without oral argument.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
Mar 19 1999

District of Columbia,
Appellee

ORDER

It is **ORDERED**, by the Court on its own motion, that the above entitled case be scheduled for oral argument on Monday, April 26, 1999 at 9:30 a.m. before Chief Judge Edwards, Circuit Judge Rogers, and Senior Circuit Judge Buckley.

A further order of the Court will be issued regarding allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM F. ROGERS, Plaintiff,	:	
V.	:	Civil Action No. 97-2093 (GK)
DISTRICT OF COLUMBIA Defendant.	:	FILED MAY 27 1998

MEMORANDUM OPINION

Plaintiff William F. Rogers brings this action pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, as amended ("ADEA"), and the First and Fourteenth Amendments to the United States Constitution. Rogers, who is over 40 years old, is a former mathematics teacher in the District of Columbia Public Schools. He was laid off during a reduction in force in July 1996. Rogers alleges that Defendant laid him off because of his age and in retaliation for prior

constitutionally protected speech on matters of public concern, namely the curriculum at Anacostia Senior High School.

This matter is now before the Court on Defendant's Motion for Summary Judgment, [#20], on the grounds that Plaintiff's Complaint is based on charges that were untimely filed with the Equal Employment Opportunity Commission ("EEOC").

Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendant's Reply, and the entire record herein, for the reasons discussed below, Defendant's Motion for Summary Judgment [#20] is hereby **granted**.

I. Background [1]

Rogers began working for the District of Columbia Public Schools in 1972. He worked at Anacostia Senior High School as a mathematics teacher from 1973 through July 1996.

On May 10, 1996, the principal of Anacostia Senior High School, Stephen Wesley, verbally informed Rogers that he had been placed on a list of nine teachers to be laid off. (Rogers Dep. At 238-39; Def.'s Mem. Summ. J at Ex. 13, Mem. From Rogers to Washington Teachers' Union of 5/13/96, at 1.)[2] On

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[1]Pursuant to Local Rule 108(h), "[i]n determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Accordingly, unless otherwise noted, the Court takes its facts from Defendants' statement of Undisputed Facts.

[2]Rogers, in his Reply to Defendant's Statement of Material Facts, contests this fact. In his Declaration, he states that "[w]hile I knew there might be a reduction in force as early as May 1996, I did not know for certain that I would be terminated until June 29, 1996." (Rogers Decl. ¶ 8.) However, Rogers' May 13, 1996 Memorandum to the

May 13, 1996, Rogers sent a Memorandum to the Washington Teachers' Union complaining about the "action taken". In his memorandum, Rogers stated that "[o]n May 10, 1996, Mr. S. Wesely [sic], the principal of Anacostia Senior High School informed me verbally that I had been placed on a list of nine (9)

Washington Teachers' Union, as well as his testimony at deposition, contradict his Declaration. For example, he stated in his deposition that, on May 10, 1996, he was in his classroom when Mr. Wesley told him that he had been placed on the list of teachers to be "excessed". (Rogers Dep. At 238-39.)

Generally, "facts asserted by the non-movant, if adequately buttressed by evidentiary material, are to be taken as true." Abraham v. Graphic Arts Int'l Union, et al., 660 F.2d 811 (D.C. Cir. 1981) (emphasis added). However, "[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment." Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993). Rogers' claim that he was not verbally notified of his own pending termination (as opposed to being notified, as he implies, merely of an impending reduction in force) on May 10, 1996 is clearly contradicted by the evidence in the record. It is clear that Rogers' Declaration was created in response to Defendant's Motion for Summary Judgment in an attempt by Plaintiff to avoid summary judgment by creating issues of fact for trial.

teachers that will be excess [sic]". (Def.'s Mem. Summ. J. at Ex. 13, Mem. From Rogers to Washington Teachers' Union of 5/13/96, at 1) (emphasis in original). Beginning May 10, 1996, Rogers had several consultations with an attorney regarding the age discrimination claims he makes in this case.

On May 30, 1996, Rogers received a memorandum from Wesley notifying him that his position was identified "as one of the mandated reductions required of ANACOSTIA High School."[3] (Def.'s Mem. Summ. J. at Ex. 20, Mem. From Wesley to Rogers of 5/30/96, at 1.)

On June 10, 1996, Rogers' attorney at the time, Francine Weiss, wrote a letter to Wesley and the Superintendent of the

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[3]Rogers admitted in his deposition testimony that he received the 5/30/96 Memorandum and that, on the Memorandum itself, he wrote the date and class period during which he received it. (Rogers Dep. At 239.) Rogers claims in his Declaration, however, that he has "no recollection of receiving exhibit 20 [, the 5/30/96 Memorandum]". Again, the Court finds his statement to be clearly contradicted by the evidence in the record.

Board of Education alleging that Rogers was being wrongfully terminated in violation of the ADEA and the First Amendment.

On June 29, 1996, Rogers formally received notice of his termination in a letter dated June 25, 1996. He filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 16, 1997. On July 24, 1997, the EEOC dismissed his charge because it found that Rogers and his attorney "knew since at least June 9, 1996, of your impending termination. You filed your charge . . . more than 300 days since you first had notice of your effective termination date." (Def.'s Mem. Summ. J., Ex. 21, Letter from EEOC to Rogers of 7/24/97, at 1.)

II Analysis

A. Standard of Review

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of the action under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In determining whether the movant has met this burden, a court must consider all factual inferences in the light most favorable to the non-moving party. McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985). Generally, "facts asserted by the non-movant, if adequately buttressed by evidentiary material, are to be taken as true." Abraham v. Graphic Arts Int'l Union, et al., 660 F.2d 811 (D.C. Cir. 1981) (emphasis added). However, "[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment."

Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

Once the moving party makes its initial showing, the nonmoving party must demonstrate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; McKinney, 765 F.2d at 1135. Moreover, "[i]n determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Local Rule 108(h).

B. Timeliness of EEOC Charge

The Supreme Court held in Chardon, et al v. Fernandez, et al., 454 U.S. 6, 7-8 (1981), that a cause of action for damages resulting from an unlawful termination of employment accrues when the decision is made and the plaintiff is notified that he will be terminated. The Chardon Court noted that "[t]he fact of

termination is not itself an illegal act" - instead, discrimination in the decision to terminate was the allegedly illegal act. Id at 8.

The Supreme Court's holding in Chardon binds the Court in this case. Rogers does not allege that it was illegal for Defendant to terminate him. Instead, he alleges that Defendant illegally discriminated and retaliated against him in its decision to terminate him. The Court must thus decide on what date, as a matter of law, Defendant's decision to terminate Rogers was communicated to him in a manner that constituted notice of his impending termination. In doing so, the Court must draw all factual inferences in the light most favorable to Rogers, the non-moving party. McKinney, 765 F.2d at 1135.

Rogers argues that, even if he had been notified in May 1996 of Defendant's decision to terminate him, that decision was not a "final and certain decision until Rogers received the specific RIF notice on June 29, 1996." (Pl.'s Opp'n to Def.'s

Mot. Summ. J. at 2.) He thus claims that the limitations period should not begin to run before that date.

In Delaware State College v. Ricks, 449 U.S. 250, 257 (1980), the plaintiff-employee received a notification letter from his employer stating that plaintiff would be denied tenure. The notice stated that the employer was "in the process" of considering plaintiff's challenge to its decision and could conceivably change its decision if plaintiff's grievance was found to be meritorious. Id. at 254 n.2. Although the plaintiff argued that the limitations period should not begin to run until he received final notice of the denial of his grievance, the Supreme Court held that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." Id. at 261, citing Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229 (1976).

The limitations period in this case thus began to run when Rogers received notice of the employment decision. The fact that the decision was under review or could be reversed does not toll the running of the limitations period under Ricks.

Moreover, on May 10, 1996, Rogers received verbal notice that he had been placed on the list of teachers to be laid off. Rogers' May 13, 1996 Memorandum to the Washington Teachers' Union, where he wrote that Mr. Wesley informed me verbally that I had been placed on a list of nine (9) teachers that will be excess [sic]", further confirms this verbal notification.

The May 30, 1996 Memorandum received by Rogers from Wesley states that:

> The purpose of this memorandum is to notify you that your position has been identified to be submitted to the Division of Human Resources as one of the mandated reductions required of ANACOSTIA High School. Regrettably the mandated district Reduction In Force board mandate . . . will affect the position you currently encumber. The identification of your position has been

> made consistent with the requirements of [the Budget Act] and the revised Board of Education Rules . . . Note that the action referenced in this memorandum is still subject to the review and final decision of the Division of Human Resources. Consistent with information regarding timeliness for notification; official notification will be determined and presented from the Division of Human Resources on June 12, 1996. It is my hope that between now and June 12, 1996 a new revised staffing allocations for secondary school will make it possible to review our reduction in force plan for ANACOSTIA High School.

(Def.'s Mem. Summ. J. at Ex. 20, Mem. From Wesley to Rogers of 5/30/96, at 1.)

While the Memorandum notes that the decision was "still subject to review and final decision of the Division of Human Resources", it is clear that a decision had been made to eliminate Rogers' position. Furthermore, it is clear that Rogers understood that such a decision had been made, as evidenced by his May 13, 1996 Memorandum to the union, his consultations

with an attorney, and the June 10, 1996 letter from his attorney to Wesley and the Superintendent of the Board of Education. The June 10 letter confirms that Rogers and his attorney had concluded by that date that the decision to terminate him was made on an unlawful basis.

The Court finds that Rogers received notice of his impending termination on May 10, 1996, the date on which he acknowledges having received verbal notice of his termination from Wesley. At the latest, however, the decision to terminate Rogers was made by May 30, 1996, when he received the Wesley Memorandum.[4]

Rogers filed his charge with the EEOC on April 16, 1997,[5] 320 days after the commencement of the limitations

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[4]Whether the Court uses the May 10 date or the later May 30 date as the date of notification, the ruling on the pending Motion remains the same.

[5]The Court rejects Rogers' argument that it should consider March 28, 1997, when he first allegedly visited the EEOC

period (assuming the limitations period did not begin to run until May 30, 1996). Rogers' EEOC charge was filed outside the limitations period and is thus barred. Defendant's Motion for Summary Judgment on Rogers' age discrimination claim is therefore **granted**.

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office, as the operative filing date. Although Rogers cites Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1138 (7th Cir. 1994) for the proposition that the "first contact with EEOC constituted [sic] date of filing charge", courts have held that, while a plaintiff's completion of an intake questionnaire can constitute a "charge" under the ADEA, they have not held that an intake questionnaire always constitutes a charge or that a visit to an EEOC office, without more, constitutes a charge. See, e.g., Park v. Howard Univ., 71 F.3d 904, 909 (D.C. Cir. 1995) ("To treat Intake Questionnaires willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant") (citation omitted); Downes, 41 F.3d at 1138 ("In order to constitute a charge, notice to the EEOC must be of a kind that would convince a reasonable person that the plaintiff manifested an intent to activate the Act's machinery"); Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 542 (7th Cir. 1988) ("The purpose of the charge-filing requirement is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination and to provide the EEOC with the opportunity to investigate the alleged unlawful practice").

C. First Amendment Claim

Defendant argues that Plaintiff's failure to include the alleged retaliation for the exercise of his First Amendment Rights in his EEOC charge precludes him from raising the claim here. Plaintiff responds, however, that his First Amendment claim is unrelated to his age discrimination claim. He states that the claim was not included in his EEOC charge because the EEOC does not have jurisdiction over such claims.

It is undisputed by both parties, however, that Plaintiff has not pursued the administrative remedies available to him before bringing his First and Fourteenth Amendment claims for damages before this Court. These claims are thus also barred and summary judgment will be entered for Defendant.

III. Conclusion

The Court has found the absence of any genuine issue of material fact. Further, as a matter of law, Plaintiff Rogers filed his EEOC Charge of Discrimination outside the limitations period and is thus precluded from bringing an employment discrimination action against the District of Columbia. Finally, Rogers failed to exhaust his administrative remedies with respect to his First and Fourteenth Amendment claims. Defendant's Motion for Summary Judgment is this **granted**. An Order will issue with this Opinion.

May 27, 1998
Date

/s/
Gladys Kessler
United States District Judge